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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted]238

ROBERT V. RAFTER,

Petitioner,

v.

NEWARK INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

No.

ROBERT V. RAFTER,

Petitioner,

v.

NEWARK INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case the 20th day of January, 1966.

Opinions Below

The opinion of the District Court is set forth at page 12a of the Appendix below and is not officially reported. The opinion of the Court of Appeals is reported at 355 Fed. (2) 185, and a copy of this opinion is appended to this petition at page B1.

Jurisdiction

The judgment of the Court of Appeals was made and entered the 20th day of January, 1966 (A. 18a). On the 4th day of May, 1966, Mr. Justice Harlan extended the time for filing a petition for writ of certiorari to and including June 18, 1966.*

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. The bases for jurisdiction.

2. The amount in controversy.

Statutes Involved

The pertinent statutory provisions are printed in Appendix B, *infra,* pp. B8, 9, and include the Fourth Amendment and Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Statement

This is an action upon a sheriff's bond for wrongful attachment of plaintiff's automobile and bank account. The District Court limited its order of dismissal to Rule 12(b)(1), Fed. R. Civ. P., lack of jurisdiction over the subject matter, *dismissing as moot all other motions* (R. 389; A. 12a, 13a).

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* Reference key: R. refers to Record on Appeal; A and B to Appendices.

The Court of Appeals in its opinion has broadened the appeal and dismissed pursuant to Rule 12(b)(6), failure to state a claim upon which relief can be granted, stating that the suit on the bond must await the establishing of liability. This basis of dismissal was not part of the District Court order appealed from and was not briefed upon appeal. In fact the Court of Appeals has overlooked the establishing of liability by decision of the Court of Common Pleas for the County of Fairfield April 22, 1965, forming a part of the record on appeal (R. 24, 119), which stated that the writ was defective (B3), and, indeed, the parties plaintiff who issued the writ withdrew their suit, and costs were taxed against them (R. 16, 26, 221, 223; B5-7). If the writ was invalid, as was conceded, then the attachment was wrongful and liability arises. In any event, it would appear that the Court of Appeals has departed from the accepted and usual course of judicial proceedings.

The Court of Appeals has ignored the constitutional issue of whether the writ of attachment which does not particularly describe the place to be searched or the things to be seized, and which is not supported by Oath or affirmation, and which purports to permit a general search after the manner of a General Warrant, violates the express terms of the Fourth Amendment (R. 22, 23, 79, 131; A. 10a, 11a). The refusal to pass upon this issue would seem to be in conflict with applicable decisions of the United States Supreme Court, notably *Den* v. *Hoboken Land and Improvement Company*, 18 How. 272, 285 (U.S. 1856) which indicates that the Fourth Amendment is applicable to a civil writ which includes a search warrant.

(1)

Determination of the constitutional issue is respectfully requested because the Court of Appeals is of the opinion that joinder of the principal is necessary to plaintiff's suit (B1), although the bond sued upon provides unequivocally that the liability is joint *and several* (R. 3; A. 5a). Joinder of the principal may defeat diversity jurisdiction; hence the allusion to 28 U.S.C. 1331 appearing at paragraph First of the complaint (R. 1; A. 2a).

The constitutional issue pervades the record before both the District Court and the Court of Appeals (R. 1, 158, 255, 310, 370, 371; A. 2a), with particular reference to plaintiff's motion and renewed motion for summary judgment (R. 10, 17, 323, 327; A. 9a) dismissed as moot by the order of the District Court (R. 389; A. 13a).

(2)

Since liability was established and demand made *prior to bringing the action* (R. 2, 24, 26, 29; A. 3a), interest forms a part of the jurisdictional amount in controversy. Interest is a measure of the damages sustained, *Intermela* v. *Perkins,* 205 Fed. 603 (CA 9th, 1913); cert. den. 231 U.S. 757, 58 L. Ed. 468, 34 S. Ct. 324; *Curtis* v. *Harris, Davis & Co.,* 272 Fed. 239 (CA 5th, 1921); *Brown* v. *Webster,* 156 U.S. 328; *Edwards* v. *Bates County,* 163 U.S. 269; Cyclopedia of Federal Practice, Vol. 1, Third Ed. Sec. 2. 190, p. 344.

It is respectfully submitted that the execution of a writ of attachment in a civil suit can be just as devastating as a warrant in a criminal action, and that the Connecticut writ is on a par with the original writ of assistance and tantamount to a General Warrant (the sheriff conducted three

general searches, R. 22, 23, 231A; A. 10a, 11a) outlawed by the Fourth Amendment as demonstrated in *Stanford* v. *State of Texas*, 85 S. Ct. 506 (1965), involving a State Constitution Statute *identical with that of Connecticut* (R. 20).

Reasons for Granting the Writ

1. The constitutional question presented is of importance since it affects all citizens of the State of Connecticut (R. 65).

2. In dismissing the action pursuant to Rule 12(b) (6) Fed. R. Civ. P., the Court of Appeals has departed from the accepted and usual course of judicial proceedings (A. 12a, 13a).

3. The decision of the Court below is in conflict with the record on appeal (R. 24, 26, 119, 125), that is to say, the decision of the Court of Common Pleas and the withdrawal of the Connecticut suit, and also in conflict with the decisions of the United States Supreme Court, *Den* v. *Hoboken Land and Improvement Company, supra*, p. 3.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT V. RAFTER
Counsel for Petitioner, pro se

APPENDIX

Opinion of the United States Court of Appeals

Before Moore, Smith and Anderson, Circuit Judges.

PER CURIAM.

Appellant sued appellee insurance company, surety on a Connecticut sheriff's penal bond in the amount of $10,000, claiming $20,000 damages. The action was brought in the Southern District of New York and transferred to the District of Connecticut. The District Court, William H. Timbers, Chief Judge, dismissed the action as not involving the jurisdictional amount and plaintiff appealed. We find the ruling correct and affirm the judgment of dismissal.

No action has been brought against the sheriff, whose service of writs of attachment claimed to be defective is the basis of the claim on the bond. Jurisdiction lies under 28 U.S.C. § 1332 (a) only if "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs." While refusal to pay on a bond after liability is established may entitle the obligee to interest after demand and prior to suit as a part of the obligation on the bond, cf. MacDonald v. Standard Accident Insurance Company, 19 Conn. Sup. 257, 111 A.2d 347 (Superior Court 1955), that is not the case here. Even if appellant here succeeded in his action without joining the principal on the bond, his recovery would be limited to the face amount of the bond plus interest after judgment, which by the plain terms of the statute is not to be included in computing the jurisdictional amount. "The phrase 'exclusive of interest and costs' (28 U.S.C. § 1332)

necessarily refers to interest accrued prior to filing the complaint'' not that accruing after. Athan v. Hartford Fire Ins. Co., 73 F.2d 66, 67 (2 Cir. 1934), Albani v. D & R Truck Service, Inc., 248 F.Supp. 268, D.Conn., June 25, 1965.

We need not discuss appellant's claim that a writ of attachment in some way is governed by constitutional limitations on search warrants, so that a federal question is involved, for the jurisdictional amount is the same whether the action is brought under 28 U.S.C. §§ 1331 or 1332.

Judgment affirmed.

B3

Decision and Order of the Court of Common Pleas

COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD

(At Stamford)

No. 5845

LEE SPIEGELMAN, et al

—VS—

ROBERT V. RAFTER

April 22, 1965

MEMORANDUM ON MOTION TO STRIKE
AMENDMENT TO COMPLAINT

The defendant's motion is based on the lack of naming a proper return day. See *Weidlich* v. *Comley*, 18 Conn. Sup. 472, 482. The plaintiffs have not sought the Court's permission to amend or followed the procedure in Section 52-72 of the General Statutes.

The motion to strike the Plea in Abatement was granted on the basis of late filing of the plea to the process as amended. Now that the process before the Court contains an improper return day (2nd Tuesday of January), the defendant may file a new plea in abatement.

Decision and Order of the Court of Common Pleas

The Court is not acting on the following motions as they are now premature:

(1) Motion for disclosure of Defense or Judgment.

(2) Motion for default.

(3) Motion to erase.

(4) Motion to compel testimony.

The motion to strike the amendment to Complaint is granted.

WALL, *J.*

B5

Notice of Withdrawal of Court of Common Pleas Action

No. 5845

LEE SPIEGELMAN, *et al*

vs.

ROBERT V. RAFTER

To the Clerk:

Court of Common Pleas
County of Fairfield at Stamford

The above case is withdrawn as to plaintiff.

Plaintiff by

/s/ KOIZIM AND DAVIDOFF
Koizim and Davidoff
Attorney

FILED
May 13, 1965
Court of Common Pleas
5/12/65

B6

Court of Common Pleas Bill of Costs

SUPERIOR COURT

COURT OF COMMON PLEAS

AT STAMFORD

LEE SPIEGELMAN and JOAN SPIEGELMAN,

Plaintiffs,

vs.

ROBERT V. RAFTER,

Defendant.

This is to certify that a copy of the within Bill of Costs was mailed this day to Koizim and Davidoff as attorneys for the plaintiffs.

Dated: June 18, 1965

/s/ ROBERT V. RAFTER
Robert V. Rafter

ROBERT V. RAFTER
Attorney for Defendant
10 Old Rock Road
Weston, Connecticut

FILED
June 19, 1965
Court of Common Pleas

Court of Common Pleas Bill of Costs

Services before Trial	$20.00
Trial of Issue of Law	25.00
Taxed by	$45.00

JOHN J. P. RYAN
Asst. Clerk.

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 12(b) of the Federal Rules of Civil Procedure

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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OCTOBER TERM, 1965

No. [redacted]238

ROBERT V. RAFTER,

Petitioner,

v.

NEWARK INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JEROME MURRAY,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1420

ROBERT V. RAFTER,

Petitioner,

v.

NEWARK INSURANCE COMPANY,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

Petitioner sued respondent in the United States District Court for the Southern District of New York and the action was subsequently transferred to the United States District Court for the District of Connecticut. The complaint seeks $20,000 in damages from respondent's bond written in the maximum penal sum of $10,000 for a Connecticut Sheriff based upon the requirements of a Connecticut statute. The District Court dismissed the action as not involving the jurisdictional amount and petitioner appealed. The United States Court of Appeals for the Second Circuit found the ruling correct and affirmed the judgment of dismissal.

Questions presented are:

1. Does the matter in controversy exceed the sum or value of $10,000, exclusive of interest and costs so as to be within the jurisdictional amount.

2. If the matter in controversy does not come within the jurisdictional amount of this Court, does this Court nevertheless obtain jurisdiction upon petitioner's claim that the writ of attachment was invalid when served upon him and thereby violated his constitutional rights.

Statement

This is an action to recover $20,000 upon a Sheriff's bond for alleged wrongful attachment by a Deputy Sheriff of petitioner's automobile and bank account. The District Court dismissed the action on respondent's motion for lack of jurisdiction over the subject matter upon the grounds that petitioner's maximum recovery under Connecticut law cannot exceed the $10,000 penalty of the bond with interest. The District Court further stated that the interest involved, not being the basic matter in question, but arising solely by virtue of a delay in payment, is not to be counted in computing the jurisdictional amount and that therefore, the jurisdiction of this Court, as invoked by petitioner pursuant to 28 U.S.C. Section 1332 (a) was never obtained.

The Court of Appeals affirmed the District Court's decision but did not broaden the appeal. Contrary to petitioner's erroneous conclusion, the Court of Appeals did not depart from accepted and usual course of judicial proceedings. The Court of Appeals merely expounded upon the determination of the District Court and its determination upon appeal with respect to when a surety might be responsible for interest in addition to the full penal amount of its bond as part of the obligation on the bond. The Court of Appeals further illustrated that if

petitioner had established the surety's liability on its bond by first obtaining a judgment against the principal, the Sheriff in this instance, the within action could properly be brought for the penal amount of the bond, to wit the sum of $10,000, plus interest as a part of the obligation on the bond, and in that instance, the question of interest would be added to the principal amount of the bond thereby coming within the jurisdictional amount.

The Court of Appeals did not ignore the constitutional question, raised for the first time by petitioner on appeal, but instead the Court of Appeals stated that the jurisdictional amount involved would be the same whether or not the action is brought under 28 U.S.C. Section 1331 or 28 U.S.C. Section 1332.

Reasons for Denying the Writ

A. The Amount in Controversy Did Not Exceed, Exclusive of Interest and Costs, the Amount of Ten Thousand Dollars.

The District Court properly concluded that the law of Connecticut limits recovery in actions on penal bonds to the amount of the bond with interest. This limitation is imposed by Conn. Gen. Stat. §52-238 (1958 Rev.) which provides in pertinent part:

> "In any action on a penal bond, containing any condition which has been broken, such damages only shall be assessed as are equitably due, . . . but the whole amount of such judgment shall not exceed the penalty of the bond with interest."

The conclusiveness of this limitation was expressed in *United Construction Workers, et al.* v. *The H. O. Canfield Company, et al.*, 19 Conn. Sup. 450, 456, 116 A. 2d 914 (1955). Rejecting petitioner's contention that recovery upon a penal bond should exceed the penal sum, Judge

Troland of the Connecticut Superior Court made the following comments:

> "No Connecticut case has been cited in which more than the penalty on the bond ever has been authorized as a recovery. In the span of 132 years, our Supreme Court has held that judgment may enter for less than the penalty, where justice requires it, but never in any case to exceed the penalty. *Carter* v. *Carter*, 4 Day 30, 36 (1809); *White* v. *Keilty*, 128 Conn. 313, 321 (1941). The obligation, or undertaking, on which this action is based is a penal bond. It is penal in form. It binds the obligors in the penal sum of $10,000.00. This being the case, a judgment thereon 'shall not exceed the penalty of the bond with interest.'"

Petitioner does not apparently dispute that his recovery upon the bond is limited to the face amount of the bond. Rather, it is his position that interest upon whatever judgment he might recover should be included in computing the jurisdictional amount.

This position is clearly untenable. It is fundamental that interest upon a judgment has no bearing on the amount in controversy requisite for federal jurisdiction. Both 28 U.S.C. §1331 and 1332 provide in pertinent part:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, . . ."

Regan v. *Marshall*, 309 F. 2d 677, 678 (1 Cir. 1962), relied upon by the District Court, interpreted the statutory provisions excluding interest from the computation of the amount in controversy as follows:

> "When the statute requires that the amount in controversy 'exceeds the sum .... of $10,000.00 exclusive

> of interest and costs . . .' it makes no difference whether the interest which is sought accumulated upon the principal obligation sued upon because of contract, or by common law, or by statute, or whether the interest be termed a penalty or damages, so long as it is an incident arising solely by virtue of a delay in payment."

In the present action petitioner has made a demand upon respondent for payment of a claim. His demand has been refused. Should petitioner recover judgment upon this claim, he would be entitled to interest on the judgment by virtue of the delay in payment. But as the District Court correctly concluded:

> "The interest here involved, not being the basic matter in question, but arising solely by virtue of a delay in payment, is not to be counted in computing the jurisdictional amount. 1 A Moore's Federal Practice, sec. 0.99 [1] (2d ed. 1965); *Regan* v. *Marshall*, 309 F. 2d 677, 678 (1st Cir. 1962); cf. *Salkind* v. *Trafalgar Hospital*, 322 F. 2d 947 (2nd Cir. 1963); *Athan* v. *Hartford Fire Insurance Company*, 73 F. 2d 66, 67 (2nd Cir. 1934); * * *."

The cases relied upon by petitioner are completely inapposite. Three of the cases involved claims to interest inherent in the cause of action itself; *Intermela, et al.* v. *Perkins*, 205 F. 603 (9 Cir. 1913) (interest on a prior judgment fixing defendant's liability); *Brown* v. *Webster*, 156 U. S. 328 (1895) (interest as consequential damages from breach of warranty deed in eviction action); *Edwards* v. *Bates County*, 163 U. S. 269 (1896) (matured interest coupons on government bonds). *Curtis* v. *Harris, Davis and Company*, 272 F. 265 (5 Cir. 1921), which did not involve interest, involved a suit upon a guaranty for $2,972.97 plus a promise contained in the guaranty to pay a 10 per cent attorney's fee and all collection costs in

event of default. Thus the total amount in controversy exceeded the then jurisdictional requirement of $3,000.00.

By distinction there is no fixed liability in the present action upon which petitioner is suing, nor is there any matured clam for interest which forms part of his cause of action. He would be entitled to interest only in the event and to the extent he might establish respondent's liability, and it would arise solely by virtue of a delay in payment.

Salkind v. *Trafalgar Hospital*, 322 F. 2d 947 (2 Cir. 1963), recently decided by this Court, controls the present appeal, and the District Court correctly dismissed this action for lack of an amount in controversy requisite for federal jurisdiction.

B. The Matter in Controversy Did Not Arise Under the Constitution, Laws or Treaties of the United States.

In paragraph one of his complaint, petitioner states:

> "This Court has jurisdiction of the subject matter of this action in accordance with the provisions of Title 28 of the United States Code, Sections 1331 and 1332."

Since the requirements for amount in controversy are the same in actions predicated upon diversity of citizenship, §1332, and federal question, §1331, the District Court's conclusions regarding lack of jurisdictional amount apply with equal efficacy to petitioner's highly imaginative claims of an unlawful search and seizure.

Moreover, petitioner's reliance upon the standards of criminal procedure for the issuance of search warrants overlooks the fact that the attachments here involved "bear no semblance to the use of the word warrant in the

Fourth Amendment." *United States* v. *935 Cases More or Less,* 136 F. 2d 523 (6 Cir. 1943); *United States* v. *75 Cases,* 146 F. 2d 124 (4 Cir. 1944). The Supreme Court long ago rejected the contention that writs of attachment violate the Fourth Amendment in holding that the amendment "has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part." *Den* v. *Hoboken Land and Improvement Company,* 18 How. 272 (U. S. 1856).

Additionally, petitioner for the first time alludes to 18 U.S.C. §241. Obviously this criminal statute prescribing conspiracies to violate civil rights has no bearing upon this civil action which, at most, states a doubtful claim of trespass, *Edmonds* v. *Buel,* 23 Conn. 242 (1854), or trespass on the case, *Luddington* v. *Peck,* 2 Conn. 700 (1818). Certainly petitioner's complaint sets forth no facts nor allegations referable to this federal criminal statute.

Accordingly, petitioner's claim did not arise under the Constitution, laws or treaties of the United States, but even if it is held that the claim did so arise, the jurisdictional amount of $10,000 would still apply and petitioner is unable to exhibit damages in excess of $10,000 exclusive of interests and costs.

CONCLUSION

The writ should be denied because the District Court lacked jurisdiction over the subject matter of this action.

Respectfully submitted,

JEROME MURRAY,
Counsel for Respondent.